83-1339

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LANCE E. EISENBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Where an indictment charges a defendant under 26 U.S.C. § 7206(2) (1976) with aiding in the preparation of false partnership tax returns that were mailed to the Internal Revenue Service, does 18 U.S.C. § 3237(b) (1976) give the defendant, upon timely motion, an absolute right to be tried in the district where he resided at the time of the alleged offense?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Lance E. Eisenberg, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 13, 1983.

OPINIONS BELOW

The decision of the United States District Court for the Southern District of West Virginia, rendered June 3, 1983, appears at 573 F. Supp. 809. It is reprinted in the Appendix to this Petition at 1a. The opinion of the United States Court of Appeals for the Fourth Circuit, rendered on December 13, 1983, is unpublished. It is reproduced in the Appendix to this petition at 5a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 13, 1983. This petition is filed within 60 days of that judgment.[1] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3237 (1976) provides:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from,

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[1] The decision of the Court of Appeals reviewed the District Court's denial of a motion to change venue in a criminal case. Petitioner proceeded in the Court of Appeals by way of appeal under the "collateral order" doctrine, *e.g.*, *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374-75 (1981); *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), and alternatively by petition for a writ of mandamus pursuant to 28 U.S.C. § 1651 (1976). The Court of Appeals did not address the appealability of the District Court's order, but instead referred to the matter throughout its opinion as a petition for mandamus. Thus we submit that this petition involves a civil matter subject to the 90-day time period for petitioning this Court established by 28 U.S.C. § 2101 (1976), and not a "judgment in a criminal case . . . of a federal court of appeals" subject to the 60-day period provided by Rule 20.1 of this Court. Out of an abundance of caution, however, we have filed this petition within the 60-day period.

through, or into which such commerce or mail matter moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

STATEMENT OF THE CASE

Petitioner Lance E. Eisenberg is a tax lawyer who resides in Miami, Florida. On April 15, 1983, he was charged in seven counts of a thirty-count indictment involving coal mining tax shelter programs.[2] The indictment was brought in the United States District Court for the Southern District of West Virginia.

Count One of the indictment charges a complex conspiracy with three alleged objects: (1) to defraud the United States by impeding and obstructing the Internal Revenue Service ("IRS"); (2) to violate 26 U.S.C. § 7206(2) (1976) in connection with the filing of false partnership tax returns; and (3) to violate § 7206(2) in connection with the filing of false individual tax returns. The remaining twenty-nine counts of the indictment all

[2] Also named in the indictment were the two promoters of the coal tax shelter programs. These co-defendants were both named in all thirty counts.

charge aiding and advising the filing of false tax returns in violation of § 7206(2).

Mr. Eisenberg is charged in Count One and in six substantive counts. Each of the latter charges Mr. Eisenberg with aiding and advising the filing of a false partnership tax return (IRS Form 1065) relating to a particular coal shelter program. In essence, Mr. Eisenberg is accused of filing a false affidavit and participating in an allegedly fraudulent loan transaction, which provided the basis for losses eventually claimed on the partnership tax returns. It is undisputed that the tax returns in question were mailed to the IRS.

Mr. Eisenberg filed a timely motion pursuant to 18 U.S.C. § 3237(b) (1976), exercising his statutory right of election "to be tried in the district in which he was residing at the time the alleged offense was committed," namely, the Southern District of Florida. Section 3237(b) confers such a right of election upon any person charged with "an offense described in section . . . 7206 . . . (2)," which "involves use of the mails." Despite the unambiguous language of the statute and the absolute right of election of venue it provides, the District Court denied Mr. Eisenberg's motion.[3]

The District Court felt itself constrained by the decision of the Fourth Circuit *In re United States (Nardone)*, 706 F.2d 494 (4th Cir.), *cert. denied*, ____ U.S. ____, 104

[3] Petitioner moved to transfer all seven counts in which he was named. He argued that the substantive counts under § 7206(2) were plainly transferable as of right pursuant to § 3237(b). With respect to the conspiracy count, petitioner urged that it too was transferable as of right since two of the three alleged objects of the conspiracy involved violations of § 7206(2), or alternatively that this count should be transferred along with the substantive counts in the sound discretion of the court and in the interest of judicial economy.

S.Ct. 496 (1983). In *Nardone* the Fourth Circuit held that the right to elect venue in a taxpayer's home district is confined to those circumstances where the government relies upon the use of the mails to establish venue in the district where the prosecution is begun.[4] In reading this additional requirement into the statute, the Fourth Circuit aligned itself with a distinct minority among the federal courts which have construed § 3237(b). It followed a lone two-to-one decision of the Second Circuit.[5] By contrast, the Ninth Circuit and every reported district court decision on the point have held that the government's basis for establishing venue in a district other than the taxpayer's residence is irrelevant to the determina-

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[4] Section 3237(a) generally permits prosecution of "continuing offenses" in "any district in which such offense was begun, continued, or completed." It also allows prosecution of offenses "involving the use of the mails, or transportation in interstate or foreign commerce" in any district "from, through, or into which such commerce or mail matter moves."

It is not clear what acts the government relies upon to establish venue in the Southern District of West Virginia for the substantive counts in the present case. In Count One, certain overt acts in furtherance of the conspiracy are alleged to have occurred in West Virginia. However, in Counts Nine through Fourteen, in which Mr. Eisenberg is charged, it is merely alleged in conclusory terms that Mr. Eisenberg aided and abetted the filing of false partnership tax returns "in the Southern District of West Virginia and elsewhere." It is not alleged anywhere in the indictment that Mr. Eisenberg has ever been in the Southern District of West Virginia. Nor are any mailings specifically referred to, though the government has stipulated that the tax returns at issue were in fact mailed to the IRS.

[5] *In re United States (Clemente)*, 608 F.2d 76 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980).

tion whether the defendant may exercise his absolute right to be tried at home.[6]

The Fourth Circuit affirmed the District Court's denial of petitioner's motion to transfer, in a brief *per curiam* opinion relying exclusively on *Nardone*.

REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit Has Rendered A Decision In Conflict With The Decision Of Another Federal Court Of Appeals On The Same Issue.

The decisions of the Fourth Circuit in this case and earlier in *Nardone* and of the Second Circuit *In re United States (Clemente)*, 608 F.2d 76 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980), conflict squarely with the decision of the Ninth Circuit in *United States* v. *United States District Court*, 693 F.2d 68 (9th Cir. 1982), and with the decisions of at least six District Courts located in at least three additional circuits.[7] The conflict in the decisions of

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[6] See *United States* v. *United States District Court*, 693 F.2d 68 (9th Cir. 1982); *United States* v. *DeMarco*, 394 F. Supp. 611 (D.D.C. 1975); *United States* v. *Youse*, 387 F. Supp. 132 (E.D. Wis. 1975); *United States* v. *Dalitz*, 248 F. Supp. 238 (S.D. Cal. 1965); *United States* v. *Rosenberg*, 226 F. Supp. 199 (S.D. Fla. 1964); *United States* v. *Kimble*, 186 F. Supp. 616 (S.D.N.Y. 1960); *United States* v. *Wortman*, 26 F.R.D. 183 (E.D. Ill. 1960), *rev'd on other grounds*, 326 F.2d 717 (7th Cir. 1964). It is worth noting that the District Court here had in fact adopted this construction of the statute. Both this case and *Nardone* arose in the Southern District of West Virginia, and both were before Chief Judge Haden of that court, who granted the defendant's motion in *Nardone* to transfer to the Eastern District of New York. See *Nardone*, 706 F.2d at 495-96. See also p. 14 *infra*.

[7] See note 6 *supra*.

the lower courts is thus a widespread and recurring one, which should be resolved by this Court.

The decision below, moreover, cannot be reconciled with the plain language of the statute or with the obvious purpose and legislative history of the statutory scheme.

2. The Decision Below Contravenes The Unambiguous Statutory Language.

Subsection (b) was added to § 3237 in 1958. Prior to that time, what is now subsection (a) accorded the government the widest possible latitude in choosing venue in criminal cases having contact with more than one judicial district. Subsection (a) contains two separate provisions. The first sentence permits the government to prosecute "any offense against the United States begun in one district and completed in another, or committed in more than one district" in "any district in which such offense was begun, continued or completed." The second sentence relates to offenses "involving the use of the mails, or transportation in interstate or foreign commerce," and allows prosecution "in any district from, through, or into which such commerce or mail matter moves."

Under this scheme, the government frequently prosecuted tax offenses in the district in which the offending tax returns were received. This imposed great hardship on many defendants, who were required to defend complex criminal cases far from their homes, records and witnesses, merely because the IRS required them to file their tax returns outside their home districts.

Congress thus enacted subsection (b), which, as amended in 1966, provides that "notwithstanding subsection (a)," a defendant "may . . . elect to be tried in the district in which he was residing at the time the alleged

offense was committed," in either of two circumstances: (1) where the offense "is described in section 7203 of the Internal Revenue Code," which punishes wilful failure to file an income tax return; and (2) "where an offense involves use of the mails and is an offense described in section 7201 [tax evasion] or section 7206(1) [making a false statement on a return], (2) [aiding or advising the filing of a false return], or (5) [concealment and falsification in connection with compromise agreement with IRS] of such Code."

The plain language of the statute thus confers a right of election upon the defendant in the circumstances of this case without regard to the basis for the government's initial choice of venue. It requires nothing more than that the offense charged be one of those listed in subsection (b) and that the offense "involves the use of the mails." It does not require that the use of the mails be an element of the offense; indeed, so to read the statute would render it nugatory, since use of the mails is not an element of any of the offenses listed. And nothing in subsection (b) suggests that the right of election it confers is tied in any way to the basis for the government's choice of venue. As one court has stated:

> Section 3237(b) requires only that the defendant use the mails to commit the acts proscribed by the statute alleged to have been violated in the indictment.

United States v. *Youse*, 387 F. Supp. 132, 135 (E.D. Wis. 1975). The Ninth Circuit recently agreed:

> The plain language of the statute does apply to the facts of this case because the defendants did use the mails to send in the tax returns at issue.

United States v. *United States District Court*, 693 F.2d at 70.

It is undisputed here that the offense charged against petitioner Eisenberg in each of the substantive counts is among those listed in subsection (b) and that the offense involved the use of the mails, in that the allegedly false tax returns were mailed to the IRS. And it is well established that

> a motion under § 3237(b) is not directed to the court's discretion, but rather Congress intended that defendants be given an absolute right to be tried for alleged violations enumerated in § 3237(b) in the district of their residence regardless of considerations of convenience.

United States v. *Youse*, 387 F. Supp. at 134.

Notwithstanding the unambiguous language of § 3237(b), the Fourth Circuit, in reliance on *Nardone*, held that petitioner was not entitled to a transfer of venue to his home district because the government (apparently)[8] did not rely upon the admitted mailing of the tax returns to establish venue in West Virginia. The Fourth Circuit in *Nardone*, like the Second Circuit in *Clemente*, sought a way to limit the scope of § 3237(b) in order to avoid "the judicial inefficiency and duplicative proceedings that would be the inevitable result of a broader interpretation of that language." *Nardone*, 706 F.2d at 496. See *Clemente*, 608 F.2d at 80.

It is quite true that construction of § 3237(b) in accordance with its plain terms will lead to situations in which the government is required to conduct more than one trial in what otherwise could be a single multi-defendant proceeding. But it is clear that in enacting § 3237(b) Congress was concerned with fairness to and the convenience

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[8] See note 4 *supra*.

of the defendant, not the government. The Ninth Circuit recognized the economies to be achieved by adding to § 3237(b) the additional requirement engrafted by the courts in *Nardone* and *Clemente*, but concluded that it was inconsistent with express will of Congress:

> Despite the practical advantages in avoiding duplicative effort, we find ourselves compelled by the plain language of the statute to reject the positions taken by the government and the Second Circuit.

United States v. *United States District Court*, 693 F.2d at 70.

3. The Decision Below Misreads The Purpose Of § 3237(b).

The Second and Fourth Circuits also seem to have based their narrowing constructions of § 3237(b) upon a very cramped reading of the statutory purpose. The *Nardone* court explained its rationale as follows:

> The evil [at which § 3237(b) was aimed] was that the many taxpayers who are required to file income tax returns in an office of the Internal Revenue Service outside the district of their residence could be prosecuted in the district of the filing rather than in the district where they resided. This was thought an unfair advantage on the part of the Internal Revenue Service and an unfairness to the taxpayer. . . . One can readily understand the congressional concern for the taxpayer summoned to stand trial in a criminal case in a district other than that of his residence simply because he was required to file his personal tax return in that district. There is no indication of any such concern for one who is being prosecuted not as a taxpayer, but as a procurer of the filing of a fraudulent partnership information return when the

> business of the partnership is centered in the district of indictment.

In re United States (Nardone), 706 F.2d at 496.

This reasoning ignores both the terms of the statute itself and its legislative history.[9] If Congress' purpose had been as narrow as the Fourth Circuit suggests, it would have afforded the right of automatic transfer only to individuals charged with filing false tax returns. But the list of offenses for which a defendant has a right to be tried at home is not so limited. The very presence of § 7206(2), under which Mr. Eisenberg is charged, among the list of transferable offenses belies the Fourth Circuit's reading of the statutory purpose. For § 7206(2) deals not with the filing of the taxpayer's own return, but with *aiding and advising in the preparation* of a false return or other document filed with the IRS.

Those who are charged under § 7206(2) are not the taxpayers themselves; they are lawyers, accountants and

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[9] The court in *Clemente* relied upon statements in the legislative history of the original enactment of subsection (b) in 1958 focusing upon the plight of the taxpayer charged with filing a false return as evidence that this was the full extent of Congress' concern, see 608 F.2d at 79-80, and the *Nardone* court merely cited *Clemente* for this proposition, see 706 F.2d at 496. However, as Judge Kearse demonstrated in dissent in *Clemente*, the 1958 legislative history by no means reflects an intent to limit the application of the statute exclusively to the situation of the taxpayer who mails his return to the IRS. See 608 F.2d at 83-85. Moreover, we submit, as did Judge Kearse, see *id.* at 85-86, that the truly significant legislative history is that surrounding the 1966 amendment of subsection (b), when Congress, aware of the broad judicial application of the statute in accordance with its literal terms, took no action to narrow its compass, but instead expanded it by adding failure to file a tax return to the list of offenses for which automatic transfer was available to the defendant. See pp. 12-13 *infra*.

other businessmen whose clients and associates file a wide variety of tax forms, usually by mail, with IRS offices located throughout the country, frequently far from their home districts. They, every bit as much as the taxpayers charged with filing false returns under § 7206(1), will frequently be in the position of Mr. Eisenberg in this case. So far as the indictment shows, Mr. Eisenberg never even left his home in Miami or came near West Virginia. His records and his witnesses, just like those of a taxpayer, are located at his office in Miami. And it is every bit as burdensome and expensive for him to defend a complex criminal case a thousand miles from home as it is for a taxpayer.

The point is driven home by the legislative and judicial history of § 3237(b). Following its enactment in 1958, it was uniformly given an interpretation by the courts that was as broad as its language. When Congress amended the statute in 1966, at least four courts had held that it afforded an absolute right of transfer when a mailing was involved, regardless of whether the mailing formed the basis for the government's choice of venue.[10] Had Congress disagreed with this reading of the statute, it could have narrowed the statute by amendment. Instead, it chose to expand it by adding § 7203 of the Internal Revenue Code, which punishes failure to file returns, to the list of offenses for which a defendant may demand to be tried in his home district. Act of Nov. 2, 1966, Pub. L. No. 89-713, 80 Stat. 1108. As one judge has observed:

> Between 1958 and 1966, courts had held, *inter alia*, that use of the mails need not be alleged *(United States* v. *Kimble, supra* [186 F. Supp. 616 (S.D.N.Y.] (1960)); that the distance between the

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[10] See cases cited in note 6 *supra*.

> defendant's residence and the district chosen by the government need not be great *(id.)*; that the transfer may even greatly enlarge the distance between a defendant's residence and the situs of trial *(United States* v. *Wortman, supra* [26 F.R.D. 183 (E.D. Ill. 1960), *rev'd on other grounds*, 326 F.2d 717 (7th Cir. 1964)] (1960)); and that co-defendants charged with tax fraud with respect to the same return may be transferred to different districts for separate, duplicative trials *(United States* v. *Rosenberg, supra* [226 F. Supp. 199 (S.D. Fla.)] (1964)). They had, in short, applied the statute broadly, as it was written.
>
> If these early decisions applying § 3237(b) in accordance with the breadth of its terms were contrary to Congress' intent, surely Congress could have been relied on in 1966 to make the simple adjustment necessary to narrow the statutory language when it was amending that very subsection.

In re United States (Clemente), 608 F.2d at 87 (Kearse, J., dissenting).

4. The Conflict Among The Circuits Is Pervasive And Recurrent And Threatens Orderly Judicial Administration.

Prosecutions of lawyers and accountants for aiding and advising the filing of false tax returns in violation of § 7206(2) are growing, not diminishing, in number. Moreover, such prosecutions, like the present one, frequently involve more than one defendant. The problem posed by this case thus will recur until it is resolved by this Court. It has been addressed in published opinions by three courts of appeals and six district courts. The present petition is the third one presenting the problem to reach this Court in slightly more than three years.

The problem of judicial administration presented by this conflict among the Circuits over the right to transfer a criminal case to one's home district has an added dimen-

sion missing from most conflict situations. In many instances, lower courts and the public can accommodate themselves to the existence of different rules in different Circuits pending resolution of the matter by this Court or by Congress. The unique problem posed by the conflict over § 3237(b) arises where the transferor court follows the majority rule and authorizes transfer in the circumstances of this case, but the transferee court follows the minority rule and refuses to accept the case on the ground that the defendant was not entitled to transfer it to his home district.

This, of course, is precisely what happened in *Nardone*. There Chief Judge Haden of the Southern District of West Virginia first followed the majority rule and ordered the case transferred to the Eastern District of New York. That court, obedient to the rule of *Clemente*, refused to docket the case. Faced with the fact that neither district court would accept venue of the *Nardone* case, and hence with the prospect that the government would be unable to proceed on the indictment, the Court of Appeals adopted the *Clemente* rule and reversed Judge Haden's transfer order.

In its recent opposition to the grant of *certiorari* in *Nardone*, the government argued that review by this Court was unnecessary because of the approval by the Senate Judiciary Committee of a legislative proposal to amend § 3237(b) to reflect the rule adopted by *Clemente* and *Nardone*.[11] While this proposal was passed by the Senate early this year, it has received no consideration in Committee in the House of Representatives. The amend-

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[11] See Memorandum for the United States in Opposition to Petition for a Writ of *Certiorari*, *Nardone* v. *United States*, No. 83-5266, October Term, 1983, at 5-6.

ment is, moreover, part of a much larger administration crime package, many of whose provisions are highly controversial. The prospects for enactment of this package are speculative at best. Thus it is highly likely that the conflict among the Circuits over the interpretation of § 3237(b) will persist until resolved by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a writ of *certiorari* should issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari were served on each of the following: Rex E. Lee, Solicitor General of the United States, Tenth & Constitution Avenue, N.W., Washington, D.C. 20530; Mary S. Feinberg, Assistant United States Attorney, Federal Building, 500 Quarrier Street, Charleston, West Virginia 25301; Thomas Dwyer, 7 Union Wharf, Boston, Massachusetts 02109; and Benjamin Brafman, 18 E. 47th Street, New York, New York 10021, by depositing true copies thereof in the United States mail, first-class, postage prepaid on this 13th day of February, 1984.

Martin R. Baach

APPENDIX

UNITED STATES DISTRICT COURT,
S.D. WEST VIRGINIA,
CHARLESTON DIVISION.

June 3, 1983.

Crim. Nos. 83-20034-01 to 83-20034-03.

UNITED STATES OF AMERICA,

Plaintiff,

v.

MILTON B. DORISON, RICHARD M. FIRESTONE AND LANCE E. EISENBERG,

Defendants.

Defendants were charged with knowingly conspiring to defraud the United States by obstructing the Internal Revenue Service's computation, assessment and collection of federal income taxes and to commit offenses against the United States by aiding and assisting in the preparation and presentation of materially false and fraudulent income tax returns. On motions to change of venue to the respective districts in which defendants lived, the District Court, Haden, Chief Judge, held that the defendants were not entitled to a change of venue where the Government maintained that venue was proper in the Southern District of West Virginia, wholly apart from any use of the mails.

Motions for change of venue denied.

Thomas E. Dwyer, Jr., Dwyer & Murray, Boston, Mass., Larry G. Kopelman, Charleston, W.Va., for Milton B. Dorison.

Benjamin Brafman, New York City, for Richard M. Firestone.

Martin R. Baach, Nussbaum, Owen & Webster, Washington, D.C., James K. Brown, Charleston, W.Va., for Lance E. Eisenberg.

MEMORANDUM OPINION AND ORDER

HADEN, Chief Judge.

On April 12, 1983, a grand jury returned the within thirty-count indictment, wherein Count One alleges that between approximately December, 1975, and the summer of 1979, that the Defendants, Dorison, Firestone and Eisenberg violated 18 U.S.C. § 371 by knowingly conspiring (1) to defraud the United States by obstructing the Internal Revenue Service's computation, assessment and collection of federal income taxes, and (2) to commit offenses against the United States by aiding and assisting in the preparation and presentation of materially false and fraudulent income tax returns. The indictment further charges Dorison, who then resided in the District of New Jersey, and Firestone, who then resided in the Southern District of New York, with having committed twenty-nine substantive violations of 26 U.S.C. § 7206(2)[1] and 18 U.S.C. § 2. Eisenberg, who then resided in the Southern District of Florida, is named as a Defendant in six[2] of these substantive counts. After their arraignment on these charges, each of the Defendants filed a timely motion for a change of venue to the respective districts wherein they reside, pursuant to 18 U.S.C. § 3237(b).[3]

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[1] 26 U.S.C. § 7206(2) provides:

"Any person who . . . [w]illfully aids or assists in or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document [shall be guilty of an offense against the United States]."

[2] *See* Counts Nine—Fourteen.

[3] 18 U.S.C. § 3237(b) provides in pertinent part as follows:

"[W]here an offense involves use of the mails and is an offense described in Section . . . 7206 . . . (2) . . . of . . . [the internal

The resolution of these motions is governed[4] by the Fourth Circuit's recent holding in *In Re U.S. (Nardone)*,[5] wherein it adopted the minority view that a defendant who is being prosecuted for an alleged violation of 26 U.S.C. § 7206(2) is not entitled to a change of venue to the district of his residence, pursuant to 18 U.S.C. § 3237(b), unless the *only* nexus between the alleged violation and the district wherein he was indicted was the use of the mails. Accordingly, Section 3237(b):

> "Is not a sword enabling the taxpayer to transfer prosecution to his district of residence in cases . . . where the government seeks to establish venue wholly apart from any use of the mails. The statute does not enable a taxpayer who has violated the law in a district by means other than the use of the mails to escape prosecution in that

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revenue] code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided* that the motion is filed within twenty days after arraignment of the defendant upon indictment . . ."

While the Government admits that the individual and partnership tax returns which are the subject of the twenty-nine substantive counts of the within indictment were filed with the Internal Revenue Service by means of the United States mail, it nonetheless maintains that these offenses do not "involve the use of the mails", as that term is used in Section 3237(b).

[4] Contending that *Nardone* neither accords Section 3237(b) its plain meaning, nor comports with the statute's legislative history, the Defendants would have the Court disregard, or at least, criticize its holding. Naturally, the Court declines their invitation, inasmuch as it is obligated to apply the law as enunciated by the United States Court of Appeals for the Fourth Circuit. *See Doe* v. *Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642 (4th Cir. 1975).

[5] 706 F.2d 494 (4th Cir. 1983) (petition for rehearing *en banc* pending), *adopting In Re U.S. (Clemente)*, 608 F.2d 76 (2d Cir. 1979).

> district simply by mailing a letter. We construe § 3237(b) to apply, at most, to tax prosecutions that involve the use of the mails in the sense that a mailing, whether or not alleged in the indictment, is the basis on which the prosecution seeks to establish venue in a district other than the taxpayer's district of residence."

In Re U.S. (Clemente), 608 F.2d 76, 80-81 (2d Cir. 1979), *cert. denied*, 446 U.S. 908, 100 S.Ct. 1834, 64 L.Ed.2d 260 (1980). *But cf.*, *U.S.* v. *United States District Court*, 693 F.2d 68 (9th Cir.1982); *U.S.* v. *DeMarco*, 394 F.Supp. 611 (D.D.C.1975); *U.S.* v. *Youse*, 387 F.Supp. 132 (E.D.Wis.1975); *U.S.* v. *Dalitz*, 248 F.Supp. 238 (S.D.Cal.1965); *U.S.* v. *Rosenberg*, 226 F.Supp. 199 (S.D.Fla.1964); *U.S.* v. *Kimble*, 186 F.Supp. 616 (S.D.N.Y.1960); *U.S.* v. *Wortman*, 26 F.R.D. 183 (E.D.Ill.1960), *reversed on other grounds*, 326 F.2d 717 (7th Cir.1964).

Inasmuch as the Government maintains the venue on the Section 7206(2) counts is proper in the Southern District of West Virginia, wholly apart from any use of the mails, the Court hereby denies the Defendants Dorison, Firestone and Eisenberg's timely motions for a change of venue, pursuant to 18 U.S.C. § 3237(b).

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to counsel of record.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1513

In Re: LANCE E. EISENBERG,

Petitioner.

No. 83-1514

UNITED STATES OF AMERICA,

Appellee,

versus

LANCE E. EISENBERG,

Appellant.

No. 83-1576

In Re: MILTON B. DORISON,

Petitioner.

No. 83-1577

UNITED STATES OF AMERICA,

Appellee,

versus

MILTON B. DORISON,

Appellant.

No. 83-1648

UNITED STATES OF AMERICA,

Appellee,

versus

RICHARD M. FIRESTONE,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Charles H. Haden, II, District Judge. (CR 83-20034-03,01)

Argued October 5, 1983. Decided December 13, 1983

Before RUSSELL, WIDENER, and PHILLIPS, Circuit Judges.

Martin R. Baach (Nussbaum, Owen & Webster; James K. Brown, Jackson, Kelly, Holt & O'Farrell; Earl J. Silbert, Schwalb, Donnenfeld, Bray & Silbert, P.C. on brief) for Appellant; Mary S. Feinberg, Assistant United States Attorney (David A. Faber, United States Attorney, Benjamin L. Bailey, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

Before the court is a petition by Lance E. Eisenberg for a writ of mandamus requiring Chief Judge Haden of the United States District Court for the Southern District of West Virginia to transfer venue of the tax fraud prosecution against Eisenberg to the Southern District of Florida, where Eisenberg resides. We deny the petition.

On April 15, 1983, Eisenberg, with others, was indicted in the Southern District of West Virginia under 26 U.S.C.

§ 7206(2) for various tax fraud offenses. He moved in that district for transfer to the Southern District of Florida, where he resides, under the provisions of 18 U.S.C. § 3237(b). In pertinent part that venue statute provides that such an election of venue may be made by a defendant when prosecution for an offense that "involves use of the mails" and that is "described in section . . . 7206(2) . . . is begun in a judicial district other than the judicial district in which the defendant resides."

While Eisenberg's motion for transfer was pending in the district court, another panel of this court construed the critical phrase "involves use of the mails" in § 3237(b) in a way which precluded Eisenberg's invocation in the instant prosecution of that statute's election of venue provision. *See In Re United States of America (Nardone)*, 706 F.2d 494 (4th Cir. 1983). Faithful to that decision, Chief Judge Haden denied Eisenberg's transfer motion on June 3, 1983. Eisenberg seeks to have that order vacated and transfer compelled by our issuance of the writ of mandamus.

We could only do so by reversing the decision of the *Nardone* panel and on that basis then invoking our supervisory writ power under 28 U.S.C. § 1651, the All-Writs Statute, to compel compliance with newly declared circuit law. Laying aside all questions of the general propriety of exercising our supervisory writ power to review orders granting or denying transfers of venue, we obviously may not invoke it to direct transfer in this case. *Nardone* has declared the law of this circuit and we have no power under the procedures of this court to reverse or avoid that decision, even were we disposed—as we are not—to reexamine the question of statutory construction it carefully addressed. Chief Judge Haden not only acted within his jurisdiction in denying the transfer motion, he acted in direct compliance with the binding rule of law declared for this circuit in *Nardone*.

The petition for writ of mandamus is accordingly denied.

DENIED.

Nos. 83-1339 and 83-1340

In the Supreme Court of the United States

OCTOBER TERM, 1983

LANCE E. EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

MILTON B. DORISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1339

LANCE E. EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-1340

MILTON B. DORISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in upholding the district court's denial of their motions for a change of venue. The question presented is identical to that presented by the petitioner in *Nardone* v. *United States*, No. 83-5266, in which certiorari was denied on November 28, 1983.

On April 12, 1983, petitioners were indicted in the Southern District of West Virginia on one count of conspiracy, in violation of 18 U.S.C. 371, and on multiple counts of aiding

and assisting in the preparation of false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). The indictments grew out of petitioners' roles in establishing and promoting an allegedly fraudulent tax shelter scheme involving the use of coal mining limited partnerships. Following their arraignment, petitioners moved for a change of venue to the districts in which they resided, citing 18 U.S.C. 3237(b). The district court denied their motions, citing the Fourth Circuit's decision in *In re United States (Nardone)*, 706 F.2d 494 (1983), cert. denied, No. 83-5266 (Nov. 28, 1983). The Fourth Circuit in *Nardone* adopted the reasoning of the Second Circuit in *In re United States (Clemente)*, 608 F.2d 76, 80-81 (1979), cert. denied, 446 U.S. 908 (1980), to the effect that Section 3237(b) —

> is not a sword enabling the taxpayer to transfer prosecution to his district of residence in cases * * * where the Government seeks to establish venue wholly apart from any use of the mails. The statute does not enable a taxpayer who has violated the law in a district by means other than use of the mails to escape prosecution in that district simply by mailing a letter. We construe § 3237(b) to apply, at most, to tax prosecutions that involve the use of the mails in the sense that a mailing, whether or not alleged in the indictment, is the basis on which the prosecution seeks to establish venue in a district other than the taxpayer's district of residence.

Upon the district court's denial of their motions, petitioners sought a writ of mandamus from the court of appeals, which held that *Nardone* had "declared the law of [the] circuit" on the question presented, and said that it was neither willing nor able "to reexamine the question of statutory construction [that *Nardone*] carefully addressed" (83-1339 Pet. App. 6a-7a). The petitions for writ of mandamus were accordingly denied.

Petitioners contend that the court of appeals erred in following *Nardone*, making essentially the same arguments that the petitioner in that case made. Regardless of the merits of petitioners' contentions, they are not ripe for review by this Court. If petitioners are acquitted after trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions, together with any other claims they may have, to this Court in petitions for writs of certiorari seeking review of final judgments against them. Review of the court of appeals' decision now would thus be premature.[1]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

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[1]Over a year has passed since the indictment in this case was issued. Further interlocutory review would cause serious additional delay in the trial of the charges against petitioners.

Because this case is at an interlocutory stage, we are not responding on the merits of petitioners' contentions. We will do so if the Court requests.

DOJ-1984-04